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In the Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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AUGUST 26, 1957.

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court on August 13, 1956. (R. 484). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b) and 2325, and is sustained by *King* v. *United States*, 344 U. S. 254. Probable jurisdiction was noted on December 10, 1956. (R. 486).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix, *infra*, pages 47–49.

QUESTIONS PRESENTED

The four questions are:

1. Whether the district court erred in setting aside the Commission's orders increasing both the interstate and intrastate suburban fares because of the absence of a finding as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income, the Commission having found that the increased fares "are necessary so that travel thereunder may make a fair contribution toward [the railroad's] indirect costs and return on investment."

2. Whether the district court erred in holding that the Commission, in fixing the fares here involved, made an improper comparison with fares previously established for the Chicago and North Western Railway Company.

3. Whether the Interstate Commerce Commission, in directing increases in intrastate passenger fares pursuant to section 13 (4) of the Interstate Commerce Act, in order to eliminate unjust discrimination against interstate commerce, is precluded from re-

lying upon evidence which had not been introduced at a prior proceeding before the State regulatory commission in which the latter had refused to allow an increase in the intrastate fares.

4. Whether the district court, in setting aside the Commission's order directing increases in intrastate fares, erred in also setting aside an order which authorized increases in interstate fares.

STATEMENT

This case involves one phase of the serious passenger-train deficit of the railroads which this Court had occasion to consider in *King* v. *United States*, 344 U. S. 254, 260–262. That condition has not improved since the *King* case.[1] *Increased Freight Rates, 1956*, 298 I. C. C. 279, 296.

The passenger service of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, herein at times referred to as the Milwaukee, is no exception to the general pattern. While this carrier's Chicago suburban service, relatively speaking, constitutes less of a drain upon its freight revenues than its passenger-

[1] In Docket No. 31954, the Commission has instituted a general investigation concerning the deficit from passenger-train service and allied services performed in passenger-train operations by railroads subject to the jurisdiction of this Commission; the railroads' passenger revenues, operating expenses and other income items relating to net railway operating income; the rate of return upon investment in road and equipment property which is used in such service; the rules of this Commission governing the separation of operating expenses, railway taxes, equipment rents and joint facility rents between freight service and passenger service; and possible ways and means of reducing or eliminating the railroad passenger-train deficit. See the Commission's Annual Report for 1956 at page 53.

service as a whole (R. 36), in 1954 the revenues from the suburban service contributed less than the bare out-of-pocket cost of performing the service.

In an effort to improve its revenues from the suburban service,[2] Milwaukee, in 1952, sought authority from the Illinois Commerce Commission to eliminate some of its trains and to increase its fares by amounts which, taking into consideration the economy effected through the proposed elimination of such trains, would give sufficient revenue to permit operation of the service without an out-of-pocket loss. After hearings, the State Commission found that the suburban service was already being operated without an out-of-pocket loss and denied the request in toto (R. 77).

Milwaukee then filed its petition with the Interstate Commerce Commission, alleging that the intrastate fares for the Chicago suburban service resulted in unjust discrimination against interstate commerce and shippers in interstate commerce, in violation of section 13 (4), and prayed for an order (1), directing increases in the intrastate fares by amounts which would remove the discrimination, (2) permitting increases in its interstate suburban fares, and (3) granting certain other relief of a technical nature[3] (R. 24).

A hearing was held on the petition and evidence was introduced by the Milwaukee, the State Commission, the Milwaukee Road Commuters' Association

[2] The suburban operation of this carrier is almost wholly intrastate, but includes two points in Wisconsin.

[3] The modification of certain outstanding orders prescribing maximum interstate and minimum intrastate one-way and round-trip fares.

and certain shippers of freight. The railroad's evidence consisted primarily of a showing of costs, based on a formula of the Commission's Bureau of Accounts, Cost Finding and Valuation, greatly exceeding revenues. The carrier included, at the insistence of the examiner (R. 160, 171, 181), information concerning the fares of the Chicago and North Western Railway Company and, in addition thereto, certain information on costs which the Commission's cost finding staff had indicated was desirable (R. 367). Thereafter, the examiner issued his proposed report in which he found that the existing fares caused unlawful discrimination against interstate commerce. He proposed fare increases, but not as great in the aggregate as those sought by the railroad. He also proposed increases in the interstate fares from and to the two Wisconsin points on the same bases as those recommended for intrastate application.

Upon consideration of exceptions to the examiner's report, the Commission issued its report and order of November 21, 1955. The Commission found that (1) the railroad's existing suburban fares did not produce sufficient revenue to cover the out-of-pocket cost of the service; (2) the intrastate suburban fares cause and, unless increased to the extent prescribed, would continue to cause undue, unreasonable, and unjust discrimination against interstate commerce; (3) such discrimination could and should be removed by establishing for such intrastate travel fares no lower than the bases prescribed; (4) the prescribed fares would be just and reasonable, would produce substantial additional revenue, and were necessary so that travel

thereunder could make a fair contribution toward the railroad's indirect costs and return on investment, and to enable it to provide adequate and efficient service; and (5) the railroad's interstate suburban fares on the same bases prescribed for intrastate suburban fares would be just and reasonable.

The order, while authorizing increases in the interstate fares[4] from and to the two Wisconsin points and other relief of a technical nature, did not require the immediate establishment of the increases in the intrastate suburban fares. Instead, following its customary procedure, the Commission allowed a period of 60 days for approval of the increases in those fares by the State Commission. This approval not having been given, the Commission, by its order of March 2, 1956, directed the Milwaukee to establish intrastate fares set forth in the report of November 21, 1955.

The State of Illinois, the Illinois Commission and the Commuters' Association then filed their complaint (R. 2) in the court below attacking the order of March 2, 1956. A temporary restraining order was also requested but was denied upon the condition that the excess fares be impounded by the railroad, to be returned to the passengers in the event the Commission's orders should be set aside (R. 440).

After a hearing on the merits, the court rendered its opinion (R. 460), holding the order of March 2, 1956, affecting the intrastate fares, to be invalid on the grounds:

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[4] The increased interstate fares were published and became effective on January 29, 1956. (State of Illinois Motion to Affirm, page 9.)

1. That findings requisite to support an order under section 13 (4) are lacking,

2. That the evidence does not permit a finding that the prescribed intrastate fares are just and reasonable, and

3. That in reaching its conclusion that the existing intrastate fares were discriminator the Commission did not limit its consideration to the same evidence which had previously been presented to the State Commission.

The court, in its decree (R. 470–471), set aside not only the order of March 2, 1956 concerned with the intrastate fares, but also the order of November 21, 1955 approving increases in the interstate fares. The court also ordered the railroad to return to the passengers all monies impounded. However, by order of June 18, 1956 (R. 474–476) the court stayed its decree pending disposition of this appeal, and subject to certain stated conditions concerning the impounded funds.

SUMMARY OF ARGUMENT

I. Under the statutory authority invoked and the context of the situation presented here, the Commission's findings are adequate to support its order.

Section 13 (4) of the Act, giving the Interstate Commerce Commission jurisdiction over intrastate rates or fares which discriminate against interstate commerce, is inextricably interwoven with the National Transportation Policy and Section 15a (2) which charge the Commission with the duty of administering the Act in such a manner as to aid in the development and maintenance of an economically sound national

trasportation system. This section must be read with that purpose in mind. Cf. *Schwabacher* v. *United States*, 334 U. S. 182, 193–194.

The intrastate suburban service of the Milwaukee, although capable of contributing more, did not, for the period here considered, pay its out-of-pocket costs. This service constitutes a drain upon the total revenues of the carrier and a discrimination against the interstate system. Such discrimination is particularly harmful to the Milwaukee whose rate of return upon the entire operation for the period involved was not more than 2 percent.

The Commission specifically found that the service at the existing fares made or imposed by state authority is being conducted at an out-of-pocket loss, that such low fares constitute an undue burden on interstate commerce, that the discrimination can be removed by increasing the existing fares by the amounts prescribed in the report, that the prescribed fares will be just and reasonable, will produce substantial additional revenues, and are necessary so that this service may make a fair contribution to the indirect costs and return, and will enable the carrier to provide adequate and efficient service.

Considering the context of the situation presented, these findings are the equivalent of those cited with approval in the *King, North Carolina* and *Florida* cases. In the *North Carolina* case this Court stated that section 13 (4) authorized the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs, and to yield a fair

return on the value of property devoted to the transportation service, both interstate and intrastate, and added that the order in the *Florida* case was sustained because it was based on findings supported by evidence that the intrastate rate "was abnormally low and less than reasonably compensatory * * * 'insufficient under all the circumstances and conditions to cover the full cost of the service'". Here, even under the prescribed basis, the revenues from the segment of the railroad's business will not cover the full cost of the service.

The ruling of the court below that the findings are inadequate is in essence a hyper-technical requirement for the use of particular words to express ideas. It places form over substance and would require, as a lower court stated in *State of New York* v. *United States*, 98 F. Supp. 855, 859, "a piling on of more words without an essential change in substance." The Court's criticism of the Commission's findings is wholly without merit.

II. The Commission's finding that the increased fares prescribed by it are just and reasonable is supported by substantial evidence. The evidence shows that those fares will result in revenues which will cover the out-of-pocket costs, disregarding nonpayroll taxes and return, and will allow a contribution of only $77,000 to the indirect costs. That contribution was so small that the Commission did not deem it necessary to discuss, and the parties made no issue over, the railroad's showing of additionally indirect costs substantially in excess of $1,000,000. The cost evidence alone affords ample support for the Commis-

sion's finding. Other evidence of record concerning the fares of competitors and other carriers serving the Chicago suburban area as well as a 14-year history of increasing patronage of the Milwaukee's suburban service also supports the conclusion from a value of service point of view.

The Chicago suburban fares of the North Western were introduced by the railroad at the insistence of the examiner and were used by him and by the Commission as a guide to value of service. The fares of the two carriers had in a former proceeding been placed on the same level and the Commission was of the view that the record here did not justify increases in the Milwaukee's fares greater than had been allowed the North Western since that former proceeding. Thus the existing fares of the North Western were used to restrict the increases sought by the Milwaukee on a cost basis.

The lower court disregards the evidence on costs and misreads the Commission's finding as being based solely upon this comparison with the fares of the North Western.

III. Section 13 (4) of the Act cannot be construed to require limitation of the evidence presented before the Interstate Commerce Commission to that presented in a prior proceeding before a State commission. Such an interpretation would change the function of the Interstate Commerce Commission in cases such as this to that of an appellate tribunal and would prevent the Interstate Commerce Commission from obtaining other evidence, as it did in this case, which

in its judgment, was necessary for the proper determination of the case.

This Court and the lower Federal Courts have held consistently that the jurisdiction and authority of the Interstate Commerce Commission to increase interstate rates or fares in order to remove unlawful discrimination against intrastate commerce is not affected by the pendency of state commission proceedings or by anything that may be done or not done in such proceedings; also that the Commission has the power under section 13 (4) to order an increase in intrastate rates or fares to remove such discrimination even if the affected carrier has not first requested the state commission to allow such increases.

The rulings of this Court and lower Federal Courts on this subject recognize the importance of intrastate rates to the revenues of the carriers and the necessity for prompt action on an allegation of discrimination. Such action is required by those provisions of the Act looking to the development and maintenance of an adequate national rail transportation system.

IV. The lower court also erred in setting aside the Commission's order of November 21, 1955, approving the increases in the interstate fares to and from the two Wisconsin points. Appellees did not in their petitions for reconsideration challenge the validity for those increases and could not challenge them in the court action. *United States* v. *L. A. Tucker Truck Line*, 344 U. S. 33. Moreover, appellees did not challenge them in the court below and the court's opinion does not deal with them. The opinion is concerned only with the order of March 2, 1956, prescribing the

intrastate fares. Notwithstanding this, the decree sets aside the order of November 21, 1955, approving the increase in the interstate fares. Since an order of the Commission is presumed to be valid and since a complaining party carries a heavy burden of making a convincing showing of its invalidity, we urge that a court, in setting aside the order, must clearly indicate in what respects such order is faulty. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658. This the lower court failed to do when the United States and the Commission filed their motion to correct the decree.

ARGUMENT

I. The Commission's order of March 2, 1956, prescribing intrastate fares is supported by adequate findings

Although there are cases in which this Court has found orders of the Commission to be invalid for lack of adequate findings, it has not, even in cases involving intrastate rates, made a fetish of findings. The findings, of course, must be specific enough so that the court may "know what the decision means before the duty becomes ours [the court's] to say whether it is right or wrong," *United States* v. *C. M. St. P. & P. Ry. Co.*, 294 U. S. 499, 511, but the findings "will vary with *the statutory authority invoked and the context of the situation presented.*" *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 228. (Emphasis supplied). Moreover, in cases involving the Commission's jurisdiction over intrastate fares, this Court has required only "reasonable determinations." *Florida* v. *United States*, 292 U. S. 1, 9. And as this court stated in *United States* v. *Louisiana*, 290 U. S. 70, 80:

> There are no formal requirements for the findings to be made by the Commission in this type of case * * *.

Rigid requirements of specific findings would, in the language of the court in *State of New York* v. *United States*, 98 F. Supp. 855, 859, affirmed, 342 U. S. 882, result "in a piling on of more words without an essential change in substance." As we shall demonstrate, the opinion of the lower court would require just that. A careful reading of the lower court's opinion in this case will readily reveal that its requirements go to form rather than to substance. However, before dealing with this, we desire to consider "the statutory authority invoked and the context of the situation presented."

A. The statutory authority invoked

To begin with, all provisions of the Interstate Commerce Act must be administered and enforced with a view to carrying out the National Transportation Policy of 1940, which places upon the Commission the duty among others, "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * *all to the end of developing, coordinating and preserving a national transportation system by* * * * rail * * * adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." [Emphasis supplied.] Similarly, section 15a (2) provides that the Commission when exercising its rate-making powers must give due consideration, among other things, to the need of revenues sufficient to enable the

carriers under honest, economical and efficient management to provide an adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service. There is a "dove-tail relation"[5] between the purpose of section 15a (2) and the provisions of section 13 (4) under which the Commission's order of March 2, 1956 was issued. The latter section provides that whenever the Commission finds, after full hearing, that any intrastate rate or fare causes "undue, unreasonable or unjust discrimination" against interstate commerce it shall prescribe the rate or fare that will in its judgment remove the discrimination. The obvious purpose of section 13 (4), as this Court pointed out in the *Wisconsin* case (pages 589–591), was to restrain undue limitation by states of the earnings of the national railway system in performing intrastate transportation. As the Court there stated (pages 585–586):

> Intrastate rates and the income therefrom must play a most important part in maintaining an adequate national railway system * * *. The effective operation of the Act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.

This Court observed that if intrastate commerce does not make its equitable contribution to the revenue requirements of the railroads, interstate commerce may have to bear the burden of making up the deficiency

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[5] *Wisconsin Railroad Co.* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 586, and *Florida* v. *United States*, 292 U. S. 1, 5–6.

through high interstate rates. The provisions of the National Transportation Policy, of section 15a (2), of section 13 (4), and of other sections of the Interstate Commerce Act not here involved show beyond question that the development and maintenance of an economical and efficient national railway transportation system is specifically made a matter of primary national concern. The Act, therefore, must be read with this purpose in mind. *Schwabacher* v. *United States*, 334 U. S. 182, 193–194.

B. The context of the situation presented

The case here is based to a large extent upon cost studies submitted by the railroad and by the Commuters' Association. In its report the Commission discussed the areas of difference between the two cost studies,[6] and, after making adjustments, found that while the revenue from the suburban service amounted to $1,963,366 ($1,799,140 plus credit for non-revenue passengers of $164,266), the out-of-pocket cost alone, excluding non-payroll taxes and return on investment,[7] was $2,269,404, resulting in an out-of-pocket deficit of $306,038. Thus, beyond question the suburban service constitutes a drain upon the total revenues of this carrier, and a discrimination against the interstate sys-

[6] The railroad's study followed in principle certain methods found in the formula developed by the Commission's Bureau of Accounting, Cost Finding and Valuation, and included certain information which the Commission's Cost Finding Staff had requested. The Commuters' study followed, with certain modifications, the study submitted by the railroad in the state proceeding. (R. 133, 242, 358, 367).

[7] Return would include such an item as interest of $93,009 on investment in diesel locomotives (R. 360).

tem. Such discrimination is particularly harmful where the rate of return from the entire operation does not approach a fair return.* The Commission stated that to the extent the:

> suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs it increases respondent's passenger deficit and results in an undue burden upon its freight operations, state and interstate (R. 35–36).

The Commission then proceeded to determine what contribution the suburban service reasonably could be expected to make. The railroad was proposing increases averaging 28.8 per cent, or a total of about $518,086 annually, based upon the 1954 volume of traffic. The Commission was of the view that such "drastic increases" would discourage travel and not result in a substantial increase in revenue. The Commission stated (R. 34-35):

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* For the year 1954, the Milwaukee's net railway operating income on freight was over $37,000,000, while its passenger deficit amounted to over $22,000,000, leaving a total net railway operating income of only approximately $14,000,000. This amount of income reflects a return of only 1.89 percent on net investment (computed from the relevant accounts in the carrier's annual report for 1954, which by stipulation is part of the record (R. 315), according to the formula used by the Commission in *Increased Freight Rates, 1951*, 297 I. C. C. 17, 25, footnote 1). Based upon the Commission formula in that case for determining return on elements of value, and using the elements for this carrier as contained in the study by the Commission's Bureau of Accounts, Cost Finding and Valuation (Elements of Value of Property of Class I Line-Haul Carriers used in Common Carrier Service as of January 1, 1955), the return would be 2 percent.

Protestant shows that the proposed fares are somewhat higher than certain of the fares of the dieselized lines of the Burlington and the Chicago, Rock Island and Pacific Railroad Company in the Chicago area, while respondent shows that they are somewhat lower than certain fares which the commissions have approved for the electric lines of the Illinois Central Railroad Company and the Chicago South Shore and South Bend Railroad in the Chicago area. However, we think that the comparison with the fares of the North Western is more persuasive, as, in the words of respondent's traffic witness, there is "a strong similarity" between the suburban territory served by it and that served by the North Western, the two sets of fares, as approved by this and the Illinois commission, having formerly been on a parity.

In a former proceeding conducted jointly by this Commission and the State Commission in 1951, the two Commissions had approved a common level of Chicago suburban fares for this carrier, and the Chicago and North Western Railway Company. Since that proceeding, the North Western's level of fares has been increased on an average of about 20 percent, and the Commission was of the view that the record here justified no greater increase for the Milwaukee.[1] The Commission found that similar increases here, based upon the 1954 volume of traffic, would eliminate the out-of-pocket deficit (excluding, of course, non-payroll taxes and return), and result in a contribution to indirect costs and taxes of approximately

[1] This particular feature of the case is discussed in detail in the following chapter of this brief.

$77,000 annually. Since the approved increases would result in revenues only approximating the out-of-pocket costs, no further consideration was given to the fully-distributed costs,[10] the Commission obviously being of the view that the small contribution obtained through the fares prescribed was all the suburban service could reasonably make.

Upon these and other subsidiary findings, the Commission made the following ultimate findings concerning the intrastate fares:

> 1. That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.
>
> 2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act.
>
> 3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.
>
> 4. That such prescribed fares will be just and reasonable for the future, will produce substan-

[10] The record contains evidence that in addition to the out-of-pocket loss the railroad suffers an additional loss of over one million dollars on a fully-distributed cost basis, which assigns to the suburban service a share of the expense incurred generally with other traffic (R. 382, 388, 428).

> tial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

We submit that these ultimate findings, amply justified by the subsidiary findings discussed above, are adequate to support the Commission's order of March 2, 1956. They show that the service at the existing fares made or imposed by state authority is being conducted at an out-of-pocket loss, that such loss constitutes an undue discrimination against interstate commerce, that the discrimination can be removed by increasing the existing fares by the amounts prescribed in the report, that the prescribed fares will be just and reasonable, will produce substantial additional revenues, and are necessary so that this service may make a fair contribution to the indirect costs and return, and will enable the carrier to provide adequate and efficient service. Surely "in the context of the situation presented" more is not required. Indeed, under decisions of this Court Finding No. 4, stating in part, that the prescribed fares "are necessary so that travel thereunder may make a fair contribution * * * to enable it [the carrier] * * * to provide adequate and efficient service * * *" justifies the order. For example, in *North Carolina* v. *United States*, 325 U. S. 507, 514, involving the intrastate passenger fares of four of the railroads operating in that State, this Court stated that

an ultimate finding that the North Carolina intrastate passenger traffic was "not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service" if based on findings and supported by evidence would justify the order. This Court pointed out that in *Florida* v. *United States*, 292 U. S. 1, involving the intrastate rates on logs in Florida, it had stated that section 13 (4) authorized the Commission "to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs, and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate", and added that the Commission's order in the *Florida* case was sustained because it was based on findings supported by evidence that the intrastate rate "was abnormally low and less than reasonably compensatory * * * 'insufficient under all the circumstances and conditions to cover the full cost of the service'". Here, of course, even under the prescribed bases, the revenues from this segment of the railroad's business will not cover the full cost of the service.

Later, in *King* v. *United States*, 344 U. S. 254, 275, in considering the adequacy of ultimate findings made by the Commission in another case, the Court stated in part:

> * * * The Commission states that the Florida intrastate rates "are abnormally low and are not contributing their fair share to the revenues required * * * to render adequate and efficient service and to operate profitably, and thereby

> accomplish the purpose of the Interstate Commerce Act * * *." Also * * * it says that the establishment of the proposed increases in intrastate rates "will substantially increase respondents' revenues therefrom, and will constitute not more than a fair proportion of respondents' total income * * *." * * * More is not needed.

Significantly, these findings were held sufficient in spite of the lack of other findings "as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" and "as to what amount of revenue was required to enable these railroads to operate efficiently."

Th. Commission's findings in this case, particularly Nos. 1 and 4 above, are the equivalent of those cited with approval in both the *North Carolina* and *King* cases.

The lower court, however, was of the view that more was needed. It held (R. 464) that the Commission's order prescribing the new level of intrastate fares was invalid because of the lack of a finding "as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income." It stated that the report did not find, either in specific dollar amounts or in any other form, what the railroad's *total income* was or what would be a *fair proportionate share* of total income from the suburban service. Realizing that this Court in the *King* case had held such findings not to be essential if others were made, the Court added, "Nor does the Commission find that the revenue pro-

duced by the intrastate rates proposed by it will constitute not more than a fair proportion of respondent's total income, which finding was held sufficient in *King* * * *." The Court indicated, however, that a finding similar to one made in the *Illinois Central* section 13 (4), case (281 I. C. C. 537), hereinafter discussed, would have been adequate. Let us examine the validity of those criticisms.

In the first place, the Court, in referring to total income, apparently means total revenues, for the Commission in its report does state that the total net railway operating income for 1954 (the significant income figure) was approximately $14,000,000, (in round figures) which, as we have previously shown, amounted to a return of not more than 2 percent. The total revenue for 1954 is shown in the carrier's annual report, which was stipulated into the record (R. 315). However, we are unable to understand the relevancy or materiality of the comparison of total revenues with the revenues from the suburban service even if the comparison is made over a period of years. The plain fact here is that on a cost basis this traffic was not even paying its out-of-pocket costs, to say nothing of the indirect costs.

Secondly, as this Court stated in the *Wisconsin* case, *supra*, "The effective operation of the Act will reasonably and justly require that intrastate traffic should pay the fair proportionate share of the cost of maintaining an adequate railway system" (p. 586). On an unprofitable segment, a fair proportionate share of the cost of maintaining an adequate railway system is clearly all of the out-of-pocket costs of that seg-

ment, plus all the contribution that it can reasonably make toward the indirect costs. Thus, the Commission stated in this case (R. 35–36):

> * * * To the extent that this suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, state and interstate * * *.

The determination of the amount of a reasonable contribution toward indirect costs involves the exercise of an informed judgment based primarily upon value of service and not upon cost. Upon the facts of this case, the Commission found that a contribution over and above out-of-pocket costs (excluding nonpayroll taxes and return) of approximately $77,000 was all that could be reasonably expected from this non-profitable service. Stated otherwise, the suburban service's fair proportionate share of the cost of maintaining an adequate railway system in this case was $2,269,404 (the out-of-pocket cost), plus $77,000 or a total of $2,346,404.

Moreover, while the Commission's report does not contain the precise finding found adequate in the *King* case, that the revenues produced by the intrastate rates prescribed by it will constitute *not more* than a fair proportion of the carrier's total income, an equivalent finding was made. Thus, in Finding No. 4 above, the Commission found that the increased fares "are necessary so that the travel thereunder may make a fair contribution toward respondent's in-

direct costs and return on investment * * *." Clearly, a finding that prescribed fares are "necessary" to make a fair contribution toward the carrier's costs and return negatives the notion that they can do more than yield a fair proportion of the carrier's total income.

The district court found the same finding of the Commission to be further deficient in that it is phrased in terms of "a fair contribution toward respondents' *indirect costs and return on investment*" rather than as "a fair proportion of respondents' *total income*", the language of the finding sustained in the *King* case. We submit that the finding of "fair contribution toward indirect costs and return on investment," coupled with the subsidiary finding that the prescribed fares will return revenue sufficient to eliminate the out-of-pocket deficit constitute, for all practical purposes, a finding of the fair proportion of total income. Those two findings are the means of measuring such a proportion. The difference in the wording here is attributable to the "context of the situation presented." Moreover, the finding criticized by the court below is substantially the same as the finding said to be lacking in *North Carolina* v. *United States*, 325 U. S. 507, 520, that the fare there in issue "did not contribute its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service."

In further support of our view that the lower court, in its criticism of the lack of a specific finding as to what contribution from the intrastate suburban serv-

ice would constitute a fair proportion of the railroad's total income, was stressing form over substance, in its statement that its view is not inconsistent with *State of Illinois* v. *United States*, 101 F. Supp. 36, because in the report there involved the Commission had made the following specific subsidiary finding:

> The fares approved herein will yield a return after taxes of about 3.2 percent, and an average increase of about 20 percent or $1,300,000 per annum, which *we find to be the approximate measure of the revenue discrimination* against interstate commerce resulting from petitioner's present multiple and commutation fares. [Emphasis added.]

The equivalent findings here are:

> If the fares were increased an average of 20 percent as in *Commutation and Multiple Fares, Illinois and Wisconsin*, *supra*, plus the additional increase to a minimum of 25 cents per trip, the increased revenue based on the 1954 movement would be about $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes of approximately $77,000 annually (R. 34).
>
> * * * * *
>
> 2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act.
>
> 3. That such undue, unreasonable, and unjust discrimination can and should be removed

by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto (R. 36).

The court also criticizes the Commission's report as being too vague concerning the "precise obligation" of the suburban service to which the fares are to contribute after meeting the out-of-pocket deficit. The Commission, of course, found the out-of-pocket cost (excluding nonpayroll taxes and return) to be $2,269,404 annually, and prescribed a scale of fares which would contribute $77,000 above that toward the additional indirect cost of over $1,000,000. The "obligation" of any service above out-of-pocket costs is that amount which it can reasonably be called upon to contribute to the overhead. It is not a "precise" obligation but depends rather upon noncost considerations, such as value of service. The obligation, of course, does exist, for obviously a carrier cannot survive if its various services pay only their respective out-of-pocket costs. But the extent of the obligation, even upon the same service, will vary from time to time. The Commission, in the exercise of its informed judgment, was of the view that from a value-of-service consideration the sum of $77,000 above out-of-pocket costs was all that the suburban service could reasonably be called upon to contribute to the indirect costs. On this record, therefore, $77,000 is the "obligation" of this service.

The court states that the "extent of the obligation must be fixed." If by this it means that the total system overhead cost burden, namely, the obligation of all services collectively, should have been determined

so that "one can know what the size of the contribution should be" from the suburban service, we submit that such an exercise was clearly not necessary. At this point the problem is not concerned essentially with costs, although we pause here to note that the record contains evidence available as a guide showing the results of certain statistical apportionments of costs as a possible additional obligation of the suburban service after meeting the out-of-pocket deficit if only costs were being considered.[11] The problem, rather, as noted above, is a noncost or value-of-service matter upon which an informed judgment must be made. The Commission in an exercise of its informed judgment has made "reasonable determinations" here. *Florida* v. *United States*, 292 U. S. 1, 9. This court requires no more.

II. Substantial evidence supports the Commission's finding that prescribed intrastate fares are just and reasonable

The court below also held that the Commission's finding that the prescribed intrastate fares would be just and reasonable was based solely and erroneously upon a comparison with the commutation fares of the Chicago & North Western Railway Company, and that this finding is thus unsupported by evidence (R. 467–469). We contend that in so holding the court below misread the Commission's report.

As we have shown above, the Milwaukee based its case primarily upon costs, and was asking for increased fares which would cover more of the cost of rendering the service. The prescribed fares, while

[11] See footnote 10, page 18, *supra*.

substantially less than those sought by the carrier, will result in revenues which cover the out-of-pocket costs ($2,269,404), disregarding nonpayroll taxes and return, and allow a contribution of only $77,000 to the indirect costs. This contribution toward indirect costs was such an insignificant amount that the Commission did not deem it necessary to discuss and the parties made no issue over the railroad's showing of indirect costs substantially in excess of $1,000,000. This cost evidence alone affords ample support for the Commission's finding that the increased fares would be just and reasonable.

The railroad also introduced evidence to show that the fares, which it was proposing on a cost basis, were not out of line with the fares of its competitors (R. 155–159). Its Assistant General Passenger Agent Pain testified that the street car and bus fare for the slower service of the Chicago Transit Authority within the city was a straight 20 cents per ride, while the Milwaukee's existing fares on a 46-ride basis from certain common points ranged from 11.9 cents to 20 cents; that from beyond the Chicago city limits, from such a point as Morton Grove, the fare for the slower service of the American Coach Bus Lines was 32 cents per ride; as compared with the railroad's fare of 25 cents on a 46-ride basis; that from Northbrook, the comparable fare for the slower service of the Chicago, North Shore and Milwaukee Railroad was 42 cents, while the Milwaukee's fare was 31.3 cents; that for the slower combination ride from Elgin over the Chicago, Aurora and Elgin Railroad and the Chicago Transit Authority the fare was 55 cents on a 60-

ride ticket, while the railroad's fare was 43.9 cents; and that for the combination ride from Roselle by use of the Hayden Motor Coach Company and the Chicago Transit Authority the fare was 55 cents, while the railroad's fare was 34.4 cents.

As the Commission points out in its report, after a joint hearing by the two commissions in 1951, the commutation fares of this railroad had been placed on the same level as those of the North Western. In 1953, the commutation fares of the North Western had been increased an average of about 20 percent, and in 1955 the minimum charge per ride had been increased to 25 cents (R. 30). During the administrative hearing in the instant proceeding, when it became apparent that the Milwaukee was not going to introduce the existing North Western scale of fares, the examiner asked that a comparison be made and introduced in exhibit form (R. 160). The requested comparison was made and introduced into the record (R. 171 and 181). This evidence showed that the Milwaukee was requesting increases substantially greater than had been allowed the North Western. When the witness failed to volunteer any explanation for requesting an increase larger than that allowed the North Western, the examiner subjected him to a searching examination during which the witness attempted to justify the proposal for increases greater than those allowed the North Western on the basis of a difference in operations but agreed there was a "strong similarity" in the nature of the suburban communities served by the two railroads (R. 177–180).

Counsel for the railroad then offered the exhibits with the following reservation (R. 181):

> * * * we wish to make our position clear, that we do not offer them as a criteria of what our fares should be, or as any suggestion on our part that these are the fares that the Milwaukee Road desires in its operation. The exhibits are offered solely in response to the Examiner's request.

Thereafter, the Commuters' Association offered evidence showing the time-schedules and suburban fares of the dieselized lines[12] of the Chicago, Burlington & Quincy Railroad Company, and the Chicago and Rock Island Pacific Railroad Company, which were on a lower basis than those of the Milwaukee (R. 284–287 and 420). The Commuters' Association also introduced into the record a comparison in rates per mile of the suburban fares with the regular passenger fares (R. 348–350). The railroad then introduced evidence showing that the suburban fares of the electric lines of the Illinois Central Railroad Company and the Chicago, South Shore and South Bend Railroad were higher than those proposed (R. 351–353).

Upon this evidence, the Commission was of the view that the "drastic increase" proposed by the carrier had not been justified from a value-of-service point of view. It thought that such increases would be largely self-defeating, and undertook to limit the

[12] The Milwaukee had converted to diesel operation in 1954. At the time of the hearing the North Western was 53.7 percent dieselized (R. 347).

increases to the level of the fares of the North Western. Such increases would result in revenues approximately equal to the out-of-pocket cost of the service, or, as stated by the Commission, it would eliminate the out-of-pocket deficit (excluding nonpayroll taxes and return) and result in a contribution to the indirect costs and taxes of about $77,000. The Commission stated (R. 34–35):

> If the fares were increased an average of 20 percent as in *Commutation and Multiple Fares, Illinois and Wisconsin, supra*, plus the additional increase to a minimum of 25 cents per trip, the increased revenue based on the 1954 movement would be about $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000 annually.
>
> Protestant shows that the proposed fares are somewhat higher than certain of the fares of the dieselized lines of the Burlington and the Chicago, Rock Island and Pacific Railroad Company in the Chicago area, while respondent shows that they are somewhat lower than certain fares which the commissions have approved for the electric lines of the Illinois Central Railroad Company and the Chicago South Shore and South Bend Railroad in the Chicago area. However, we think that the comparison with the fares of the North Western is more persuasive, as, in the words of respondent's traffic witness, there is "strong similarity" between the suburban territory served by it and that served by the North Western, the two sets of fares, as approved by this and the Illinois

commission, having formerly been on a parity.

Respondent shows that its suburban traffic has changed little in recent years and thus urges that the 1951 increase had no adverse effect on the movement of the traffic. It does not follow that the drastic increases now proposed, particularly for distances over 9 miles, would have no such adverse effect. There is no adequate support for the proposed increase in the 25-ride fares from 11.5 to 12.5 times the round-trip fares. We found that a similar increase proposed by the North Western, by discouraging travel, would not result in a substantial increase in revenue, and a like finding is warranted here.

The court below was of the view that the Commission had rested its finding of reasonableness solely upon the comparison with the fares of the North Western, and ruled that such a basis could not be used in the absence of a showing of "comparability in operation". We submit that the court obviously misread the Commission's report. The report shows beyond question that the comparison with the fares of the North Western was used to determine the single element of value of service. The Commission was of the view that the "drastic increases" proposed by the Milwaukee would discourage travel and not result in a substantial increase in revenues. It therefore restricted the proposed increases to those already allowed the North Western because the "two sets of fares as approved by this and the Illinois commission having [had] formerly been on a parity". The prescribed increases resulting in revenues approxi-

mating out-of-pocket cost are obviously just and reasonable on a cost basis alone.[13] And the Commission referred to the fares of the North Western solely for the purpose of cutting down, or placing a ceiling upon the fare increases sought by Milwaukee. Accordingly, contrary to the view of the court below, it was irrelevant whether the equipment, service or operating conditions of the two carriers were comparable.[14]

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[13] Indeed, under the law of the State of Illinois lower fares could not be prescribed. The Supreme Court of that State has held, in connection with the suburban fares of this carrier, that the State is without power to require this traffic to be carried at a loss, or without *substantial compensation* over its proper cost. *Flemming* v. *Illinois Commerce Commission*, 57 N. E. (2d) 384, 390–392.

[14] Even under the lower court's mistaken view of the use of the comparisons, the ruling is at variance with long established principles for ratemaking recognized by this Court as well as by the Interstate Commerce Commission. The lower court ruled in effect that rate comparisons have no probative value in the absence of a showing of comparability in operation. Both this Court and the Commission have held that a comparison of rates on traffic moving in the same or adjacent territory has probative value. *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, 480; *Tidewater Associated Oil Co.* v. *A. T. & S. F. Ry. Co.*, 278 I. C. C. 586, 589, and *Summer & Co.* v. *Erie R. Co.*, 262 I. C. C. 43, 46. Moreover, in *Commutation & Multiple Fares between Illinois & Wisconsin*, 288 I. C. C. 15 (the 1953 North Western proceeding), which the lower court quotes from in its opinion, the same basis of interstate Chicago suburban fares was approved for the steam operation of the North Western and for the electric operation of the Chicago, North Shore & Milwaukee Ry. Co. In *Illinois Central Multiple Fares in Chicago Area*, 281 I. C. C. 537, 551, and 289 I. C. C. 133, 138–140, the Interstate Commerce Commission compared the prescribed fares of that electric line with those of the North Western and other carriers operating in the

III. Section 13 (4) cannot be interpreted to require the limitation of the evidence presented before the Interstate Commerce Commission to that presented in a prior proceeding before the State Commission

In the cost study which it submitted in the State Commission proceeding, the Milwaukee employed an abbreviated formula and omitted such out-of-pocket items as depreciation and maintenance-of-way expenses, on the assumption that the abbreviated study was sufficient to show that its out-of-pocket costs were greatly in excess of existing or prospective revenues (R. 359). There, it will be recalled, the railroad was simply seeking additional revenues sufficient to cover its out-of-pocket costs after the elimination of certain of its trains. In the proceeding before the Interstate Commerce Commission, the railroad's cost study followed more closely the formula developed by the Commission's cost finding staff and included items for depreciation and maintenance-of-way expenses at the out-of-pocket level.[15] However, here again the railroad omitted non-payroll taxes and return on investment from its study even though, as the witness pointed out, one item of return (on the diesel locomotives) amounted to $93,000 (R. 359–360).

Chicago area. Comparisons of a similar nature were also made in *Commutation Fares Between New Orleans & Mississippi*, 278 I. C. C. 567; *Chicago, South Shore & South Bend Railroad Fares*, 279 I. C. C. 663; and *Fares, Chicago, South Shore & South Bend Railroad*, 291 I. C. C. 665.

[15] Moreover, at the suggestion of the Commission's cost finding staff, the railroad introduced evidence explaining in more detail its comparisons of expenses with revenues (R. 367) and upon the insistence of the examiner, the North Western's scale was introduced (R. 160, 171, 181).

The lower court, after referring to the fact that the Commission in its report had indicated that the railroad should have made a more complete showing of costs in the State proceeding, stated (R. 469–470):

> * * * If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.
>
> * * * * * * *
>
> Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, § 13 (4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us.

The ruling makes it a condition precedent to any action by the Commission under section 13 (4) that the petitioning railroad must first have presented to the State Commission for its consideration the identical evidence presented to the Interstate Commerce Commission. Such a ruling, if allowed to stand, would change the function of the Interstate Commerce Commission in cases such as this to that of an appellate tribunal and would prevent the Commission from requiring or receiving additional evidence which, in its judgment, was necessary for the proper determination of the case. This Commission, of course, readily agrees that the presentation in the state proceeding

should be thorough and the purpose of the statement in its report was to encourage carriers to make such a presentation. However, the court's statement that section 13 (4) *requires* such procedure is clearly erroneous.

This Court and the lower Federal courts have held consistently that the jurisdiction and authority of the Interstate Commerce Commission to increase intrastate rates or fares in order to remove unlawful discrimination against interstate commerce is not affected by the pendency of state commission proceedings or by anything that may be done or not done in such proceedings; also that the Commission has the power under section 13 (4) to order an increase in intrastate rates or fares to remove such discrimination even if the affected carrier has not first requested the state commission to allow such increases.

Thus, in *Florida* v. *United States*, 282 U. S. 194, the Commission, acting under the authority of Section 13 (4), had ordered increases in certain intrastate rates called the "Cummer Scale." That scale of rates had not been prescribed by the Florida Railroad Commission and was not the result of any affirmative action on its part. It was therefore contended that the order exceeded the authority of the Interstate Commerce Commission because the intrastate rates were not "made or imposed" by authority of the State within the meaning of section 13 (3) of the Interstate Commerce Act. This Court said, however, that the rates were maintained in intrastate commerce subject to the authority of the State and were published as required by its laws and that therefore the rates might be re-

garded as made by the authority of the State and within the purview of the Interstate Commerce Act unless its provisions disclosed an intention to exclude intrastate rates of this sort. In holding to the contrary, the Court stated (p. 210):

> * * * But it is clear that the fundamental purpose of the Congress in enacting section 13, subdivisions (3) and (4), was to reach intrastate rates that were found to result in unjust discrimination against interstate commerce. It was not the fact that the rate was affirmatively prescribed by the State, but that it was maintained as an intrastate rate, and as such was inimical to the proper interests of interstate commerce, that led the Congress to give to the Interstate Commerce Commission express authority to take cognizance of that rate and to prescribe the intrastate rate that should be charged thereafter in order to remove the undue discrimination. See *Board of Railroad Commissioners* v. *Great Northern Railway Company*, 281 U. S. 412, 424–428. The provision of section 13 (3) for notice to, and conference with, the authorities of the State, is important not only where the rates have been prescribed by the State, but also where they are in force with the permission of the State and, as intrastate rates, would otherwise be subject to the jurisdiction of the State. To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first "sat in judgment on the issue of the lawfulness of those intrastate rates" would

be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority.

In *North Carolina* v. *United States*, 128 F. Supp. 718 (E. D. N. C.), affirmed, 350 U. S. 805, the railroads sought and obtained an order from the Interstate Commerce Commission increasing intrastate rates pursuant to section 13 (4) without having first exhausted the remedies as to those rates given by state law. The court, in affirming the order, said that the contention that the Interstate Commerce Commission was without jurisdiction until remedies under state law had been exhausted "is without merit". Accord: *Illinois* v. *United States*, 101 F. Supp. 36, 47 (N. D. Ill.), affirmed, 342 U. S. 930, rehearing denied, 343 U. S. 911.

Those interpretations recognize the importance of intrastate rates to the revenues of the carriers and the necessity for prompt action on an allegation of discrimination. Prompt and unfettered action by the Interstate Commerce Commission is in complete harmony with, and indeed is required by, the provisions of the Interstate Commerce Act. The provisions of section 13 (3) and (4) delegating power to the Commission to increase discriminatory intrastate rates in the interest of the carrier revenue, was but one of the many provisions of the 1920 Act looking to the development and maintenance of adequate national rail transportation service. As expressed in *New England Divisions* Case, 261 U. S. 184, 189–190,

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Rail-*

> *road Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Therefore, the effort of Congress has been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.

In the *Florida* case, *supra*, this Court, by the following quoted language, indicated clearly that the authority granted by section 13 (4) is to be construed in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system (pp. 210–211):

> The power of the Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. [Citations omitted.] In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a state-wide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute.

In construing the statute this Court has held that the general provision of section 13 (4) prohibiting "unjust discrimination against interstate commerce" and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with section 15a, both of which were added by Transportation Act, 1920 (secs. 416, 422, 41 Stat. 484, 488). There is what this Court has called a "dovetail relation" between the two provisions. The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.

As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra; New York* v. *United States, supra*, pp. 585, 586.

The fundamental policy adopted by the 1920 Act has been adhered to and has been enlarged by subsequent legislation, particularly the Transportation Act of 1940 and the National Transportation Policy adopted as a part of that legislation. See *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80–81;

Texas v. *United States*, 292 U. S. 522, 530–531; *I. C. C.* v. *Parker*, 326 U. S. 60, 66–68, and particularly *Schwabacher* v. *United States*, 334 U. S. 182, 193–194, in which the Court said:

> This Court has recently and unanimously said in reference to this Act, "Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118.

Accordingly, we submit that the decision below is clearly erroneous in holding that the Interstate Commerce Commission, in a proceeding under section 13 (3) and (4) may not consider evidence which was not submitted to the State Commission.

IV. The order dated November 21, 1955, approving increases in the interstate fares was not attacked before the Commission nor in the Court action and the Court erred in also setting aside that order

After the Commission had approved the increases in the suburban fares between the two Wisconsin points and Chicago, the railroad filed an appropriate schedule which became effective on January 29, 1956. Thereafter, the State Commission and the Commuters Association filed petitions for reconsideration of the Commission's report of November 21, 1955, in which they argued that the report was in error in several respects. Their objections were not directed to the interstate fares approved in the Commission's order of November 21. The petition of the Commuters

Association did ask that the operation of the order of November 21 be stayed, but when read in context and considering that the interstate fares had already become effective, the request was clearly not directed at those fares.

The Commission's order of March 2, 1956, refers to petitions for review of the *report* of November 21 and denies those petitions. It does not mention the *order* of November 21, thereby clearly indicating that, in the Commission's view, the *order* was not involved.

The complaint in the court below alleged that plaintiffs were bringing the action "as representatives of the public, and particularly of the passengers who ride the suburban trains of the Milwaukee road *between Chicago and the northern boundary of Illinois on the North Line* and between Chicago and Elgin on the West Line * * *." (R. 21). It sought to have set aside "an order of the Interstate Commerce Commission dated March 2, 1956 (and the prior report and order dated November 21, 1955, upon which the order of March 2, 1956 was based) fixing intrastate rates of fare for suburban passenger service between *Chicago and Illinois State Line* on the so-called 'North Line' and between Chicago and Elgin, Illinois, on the so-called 'West Line' of the Milwaukee road" (R. 2). [Emphasis supplied.]

The complaint obviously was not concerned with the interstate fares and, of course, could not attack them since plaintiffs had not pressed the issue in their petitions for reconsideration. *United States* v. *L. A.*

Tucker Truck Line, 344 U. S. 33, and *W. J. Dilbur* v. *United States*, 101 F. Supp. 506, aff'd, 344 U. S. 883.

The validity of the interstate increases was not litigated in the Court below and is not mentioned in the Court's opinion, except in one place where the Court quotes the ultimate findings from the Commission's report (R. 463). The Court's opinion is limited to the consideration of "an order" "entered March 2, 1956" authorizing the railroad "to put into effect intrastate rates or fares" (R. 460); and concludes with the following paragraph:

> For the reasons hereinbefore set forth, *the order* of the Interstate Commerce Commission is set aside and the subject matter thereof is remanded to that commission for further proceedings not inconsisfent herewith. A permanent injunction will issue forthwith, as prayed. [Emphasis supplied.]

Notwithstanding the fact that the order of November 21 approving the interstate fares was not litigated before the Court nor discussed, in its opinion, the decree of June 14, 1956, holds that order along with the late order involving the intrastate fares (1) to be beyond the power and an abuse of authority of the Interstate Commerce Commission, (2) not supported by the findings of nor by the evidence before the Interstate Commerce Commission, and (3) void (R. 471).

The United States and the Interstate Commerce Commission, assuming that the order of November 21, 1955, approving the interstate fares had been in-

advertently included in the decree, filed a motion to correct.[16] The court denied the motion.

As we show above, neither in their petition for reconsideration before the Interstate Commerce Commission nor in their complaint did appellees attack the validity of the Commission's approval of the interstate fares. The court below therefore could not pass upon that part of the Commission's action. But assuming, *arguendo*, that the lower court could properly rule upon the Commission's order approving the interstate fares, we submit that, in setting aside such an order, the court must indicate, at least in a general way, what it deems to be the error committed by the Commission. As this Court stated in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512–513 (quoting from earlier cases):

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated

[16] The motion also requested that the ruling to the effect that the Commission may not consider evidence not previously presented in the state proceeding be deleted from the opinion (R. 480).

railroad. "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 550.

Since the order is presumed to be valid and a complaining party carries a heavy burden of making a convincing showing of its invalidity, we urge that the Commission is entitled to know in what respects its action is faulty when a Court sets aside its order. In this respect, the view of this Court in *Virginian Ry. v. United States*, 272 U. S. 658, 675, is appropos. There the lower Court sustained the Commission's order but delivered no opinion. This Court said:

> Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts. For being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by

requests for rulings. The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal. And the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor.

We submit that even if the order approving the interstate fares had been contested before the Court, the opinion should have stated the ground for setting it aside.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.

Respectfully submitted.

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AUGUST 1957.

APPENDIX

National Transportation Policy. (49 U. S. C. note preceding section 1):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 13 (3) and (4). (49 U. S. C. 13 (3) and (4):

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or prac-

tice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classi-

fications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2). (49 U. S. C. 15a (2)):

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.